7-9-2009

State v. Wheeler Respondent's Brief Dckt. 35194

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 35194
	)	
vs.	)	
	)	
SHAWN THOMAS WHEELER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

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STATEMENT OF THE CASE

Nature Of The Case

Shawn Thomas Wheeler appeals from the judgment of conviction entered upon the jury verdict finding him guilty of felony driving under the influence claiming (1) the prosecutor engaged in misconduct by allegedly presenting false testimony, and (2) the district court erred in denying his motion to suppress the results of his blood alcohol concentration test.

Statement Of Facts And Course Of Proceedings

Trooper Jeff Jayne received a report that an individual, later identified as Wheeler, was driving drunk along Highway 200 near the rock quarry. (Trial Tr., Vol. I, p.49, L.2 – p.50, L.1; Ex. E, p.2.) When Trooper Jayne drove past the quarry, he saw Wheeler on the ground in the quarry, lying near his motorcycle. (Trial Tr., Vol. I, p.52, Ls.1-16; Ex. E, p.2.) Wheeler sat up and looked around as Trooper Jayne drove by. (Trial Tr., Vol. I, p.52, Ls.12-16.) At that point, Trooper Jayne and Lieutenant Jim Drake decided to park off the side of the highway near the quarry and wait to see if Wheeler would drive back out on the highway. (Trial Tr., Vol. I, p.56, Ls.12-25.)

As Trooper Jayne and Lieutenant Drake were standing outside of their patrol vehicles talking, they heard a motorcycle "starting and revving," at which point Trooper Jayne "stepped out real quick out to the highway on foot to try to look down the highway to see if [he] could see anything" and saw Wheeler "finishing his turn out of the rock pit and start heading west on his motorcycle." (Trial Tr., Vol. I, p.58, L.21 – p.59, L.7; Ex. E, p.2.) Trooper Jayne and

Lieutenant Drake then got back in their cars and pursued Wheeler down the highway, eventually stopping him. (Trial Tr., Vol. I, p.59, L.24 – p.60, L.7, p.61, L.21 – p.67, L.12; Ex. E, p.2.)

After Trooper Jayne detained Wheeler he attempted to perform field sobriety tests, but Wheeler was not cooperative. (Ex. E, p.2; Supp. Hrg. Tr., p.8, L.11 –p.9, L.2.) Trooper Jayne asked Wheeler to submit to a breath test but Wheeler initially did not respond. (Trial Tr., Vol. I, p.71, L.24 – p.72, L.8.) Although Wheeler eventually said "yeah" after Trooper Jayne asked him several times whether he would take a breath test, Wheeler then immediately started asking Trooper Jayne about the location of the "bulldozers." (Ex. 1,[1] 18:31:35-58.) Trooper Jayne interpreted Wheeler's unresponsive behavior and his "changing the subject and talking about other things" as a refusal to submit to breath testing and requested assistance for a blood draw. (Trial Tr., Vol. I, p.72, Ls.3-6; Ex. 1, 18:51:20-29.) Trooper Jayne also later indicated a preference for a blood draw versus a breath test. (Ex. 1, 18:51:25-29.)

Trooper Jayne had Lieutenant Drake request the assistance of the "ambulance crew" to withdraw Wheeler's blood for testing.[2] (Trial Tr., Vol. I, p.72, Ls.18-21; Ex. 1, 18:33:50-18:34:10.) The "ambulance crew" responded and one of the crew members who indicated he was qualified to draw Wheeler's blood did so while Wheeler was in the back of Trooper Jayne's patrol car. (Trial Tr., Vol. I,

[1] Exhibit 1 is a recording of the traffic stop from Trooper Jayne's patrol car. (Trial Tr., Vol. I, p.60, Ls.8-16.)

[2] The ambulance crew had been on scene earlier after the initial call regarding Wheeler's physical condition due to concerns that he might need medical assistance. (Trial Tr., Vol. I, p.198, L.3 – p.200, L.1.)

p.72, L.18 – p.73, L.12; Ex. 1, 18:53:50 –19:03:33.) The results of the blood test revealed Wheeler's blood alcohol concentration was .31. (Ex. 4.)

The state charged Wheeler with felony driving under the influence and driving without privileges. (R., pp.8-12, 17-18.) Prior to trial, Wheeler filed a motion to suppress contending he was "subjected to unreasonable force, during and after a blood draw initiated by the arresting officer." (R., p.41.) The court conducted an evidentiary hearing and denied the motion. (See generally 7/25/07 Tr.; R., p.48.)

A jury convicted Wheeler (R., p.110) and the court imposed a unified ten-year sentence with four years fixed and retained jurisdiction (R., pp.117-119, 126-130). Wheeler filed a timely notice of appeal. (R., pp.115-16.)

ISSUES

Wheeler states the issues on appeal as:

1. Did the prosecutor commit prosecutorial misconduct by continuing to allow the police officer to submit false testimony and then vouching for the trooper's credibility during closing arguments?

2. Did the district court err in denying Mr. Wheeler's motion to suppress the results of the forcible blood draw because it was unreasonable under the circumstances and Mr. Wheeler revoked his implied consent?

(Appellant's Brief, p.16.)

The state rephrases the issues on appeal as:

1. Has Wheeler failed to establish any basis for concluding the prosecutor engaged in misconduct by "allow[ing]" Trooper Jayne to present false testimony?

2. Has Wheeler failed to establish the district court erred in denying his motion to suppress?

ARGUMENT

I.
Wheeler Has Failed To Establish Any Basis For Concluding The Prosecutor Engaged In Misconduct By "Allow[ing]" Trooper Jayne To Present False Testimony

A. Introduction

Wheeler claims the "prosecutor committed misconduct when he allowed Trooper Jayne to testify falsely without correction." (Appellant's Brief, p.17.) More specifically, Wheeler asserts Trooper Jayne falsely testified (1) at the preliminary hearing regarding his efforts to obtain a breath test from Wheeler and that Wheeler's "driving 'should show pretty good on [the] video,'" and (2) at the suppression hearing and at trial regarding the sequence of events in relation to reading Wheeler the advisory form and requesting a breath sample and giving Wheeler the option between a breath test and a blood test. (Appellant's Brief, pp.17-22.) A review of the record and the applicable law reveals Wheeler has failed to establish any due process violation.

B. Standard Of Review

Appellate courts employ a bifurcated standard of reviewing due process claims on appeal, deferring to the trial court's factual findings but freely reviewing the application of the law to the facts found. State v. Schevers, 132 Idaho 786, 788, 979 P.2d 659, 661 (Ct. App. 1999); State v. Gray, 129 Idaho 784, 796, 932 P.2d 907, 919 (Ct. App. 1997).

C. Wheeler Has Failed To Establish The Prosecutor Engaged In Misconduct

In Napue v. Illinois, 360 U.S. 264, 269 (1959), the Supreme Court reiterated the well-established principle that the state cannot obtain a conviction through the knowing presentation of false evidence, including false testimony. "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. at 269 (citations omitted). "To prevail on a Napue claim, [Wheeler] must show that '(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) . . . the false testimony was material.'" Hovey v. Ayers, 458 F.3d 892, 916 (9th Cir. 2006) (quoting Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005) (en banc)). Materiality is based upon whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." Sivak v. State, 134 Idaho 641, 649, 8 P.3d 636, 644 (2000) (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)). "'[T]he fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.'" Id.

As an initial matter, the state submits Wheeler has failed to preserve his due process claims for appeal. "[T]he longstanding rule in Idaho is that appellate courts will not consider issues, including constitutional issues, that are presented for the first time on appeal." State v. Cobler, --- P.3d ----, 2009 WL 260618 * 5 (citing State v. Fry, 128 Idaho 50, 54-55, 910 P.2d 164, 168-69 (Ct.App.1994)). The only exception to this rule is if the error is fundamental. Id. However, even if a claim could be considered as fundamental error, such a claim still cannot be

considered if there is an inadequate record. Id. Because Wheeler did not raise any Napue claim before the district court, there are no factual findings by the district court nor is there any evidentiary development of Wheeler's constitutional claims. This Court should, therefore, decline to consider Wheeler's Napue claims. See, e.g., State v. Moore, 648 S.E.2d 288, 293-94 (N.C.App. 2007); State v. Singleton, 923 So.2d 803, 810 (La.App. 5 Cir. 2006).

Even if this Court considers Wheeler's Napue claims for the first time on appeal, application of the foregoing standards to each of Wheeler's claims reveals he has failed establish any Napue violation. Wheeler asserts Trooper Jayne testified falsely at the preliminary hearing by (1) "stat[ing] that he tried to hold up the Alco-Sensor II" but "Wheeler would turn away and look away," and (2) "claim[ing] that Mr. Wheeler's driving 'should show pretty good on my video.'" (Appellant's Brief, p.20.) In support of his claim that this testimony was false, Wheeler cites "Exhibit, ISP Video" which he asserts reveals (1) Trooper Jayne's claim that he attempted to use the Alco-Sensor III is "completely false" because the video shows no such attempt, and (2) "[t]he only driving that is visible on the video is Mr. Wheeler being on Mr. Overman's property." (Appellant's Brief, p.20.)

With respect to Wheeler's first argument that Trooper Jayne's testimony at the preliminary hearing that he attempted to use the Alco-Sensor was false, the state acknowledges the video does not reveal any such attempt. (See Ex. 1, 18:25:25-18:31:00.) Even assuming the video contradicts the Trooper's testimony, this does not establish a Napue violation. Trooper Jayne testified he had not reviewed the video prior to the preliminary hearing and was, therefore,

apparently testifying solely based on his recollection of the incident.[3] (Prelim. Tr., p.14, Ls.1-4.) Further, there is no evidence that the prosecutor reviewed the video prior to the hearing. Although the prosecutor theoretically could have known Trooper Jayne's testimony on this point was inconsistent with the video, there was no "reasonable likelihood that the false testimony could have affected the judgment of the jury," Sivak, *supra*, nor was it material to whether there was probable cause to bind Wheeler over for felony driving under the influence.

Wheeler's claim that the prosecutor knowingly permitted Trooper Jayne to falsely testify that "Wheeler's driving 'should show pretty good on [his] video'" also fails. Trooper Jayne's *belief* that the video would provide better footage of Wheeler's driving than it actually did does not make his testimony false. Accordingly, the prosecutor had no duty to "correct" Trooper Jayne's testimony. Furthermore, even if Trooper Jayne's testimony could be characterized as "false" there was no "reasonable likelihood that the false testimony could have affected the judgment of the jury," Sivak, *supra*, nor was it material to whether there was probable cause.

Wheeler next argues that Trooper Jayne lied at the suppression hearing and at trial regarding when he asked Wheeler to submit to a breath test in relation to reading the advisory and whether or not he gave Wheeler a choice between a breath test and a blood test. (Appellant's Brief, pp.21-22.) With

[3] It is possible Trooper Jayne confused this particular encounter with Wheeler with prior encounters. (See Supp. Hrg. Tr., p.9, L.22 – p.11, L.5 (detailing prior encounter with Wheeler where Wheeler was intoxicated and also uncooperative).)

respect to the sequence of events relative to the advisory form, Wheeler refers to the following testimony from the suppression hearing:

> Q: What was the next phase of the investigation that you intended to implement?
>
> A: I read Mr. Wheeler the Idaho 18-8002 advisory form advising him of the requirements to provide evidentiary testing and the results or the consequences if he did not. Then asked him to provide a breath sample, he would not do that.

(Supp. Hrg. Tr., p.11, Ls.10-16.)

Wheeler claims this testimony was false because "Trooper Jayne never offered Mr. Wheeler the opportunity to give a breath sample *after* reading his advisory rights." (Appellant's Brief, p.21 (emphasis added).) While it is true that Trooper Jayne's request for a breath test was made prior to rather than after the reading of the advisory form, Trooper Jayne did in fact read the advisory form and did in fact ask Wheeler if he would submit to a breath test. That the request preceded the reading of the advisory rather than followed it is surely not the type of falsehood with which the Constitution or the Supreme Court in Napue was concerned. See, e.g., Davies v. Warden Louisiana State Penitentiary, 2008 WL 2680403 *5 (W.D.La. 2008). Even if it were, Wheeler's claim of error fails because the testimony regarding the timing of the request for a breath test in relation to when Trooper Jayne read the advisory was not material to the suppression issue which challenged only the reasonableness of the blood draw.

With respect to Trooper Jayne's testimony at trial on this same issue, the testimony was not presented by the state. Rather, it was only introduced when defense counsel had Trooper Jayne read and explain the portion of his testimony

from the suppression hearing relating to the advisory form. (Appellant's Brief, p.22.) As such, Wheeler cannot legitimately claim that the state knowingly introduced false evidence at trial. This is especially true given the fact it was the state that introduced the video upon which Wheeler relies to support his claim that Trooper Jayne's testimony was false. To the extent there were inconsistencies between Trooper Jayne's testimony at any given time and what appeared in the video, that evidence was presented to the jury by the state. The state had no further obligation to also highlight any inconsistencies on behalf of Wheeler. Wheeler has failed to establish the prosecutor engaged in misconduct in relation to this or any other alleged Napue violation.

Wheeler also asserts the prosecutor engaged in misconduct by not only not correcting Trooper Jayne's allegedly false testimony but by "vouching" for his credibility during closing argument. (Appellant's Brief, pp.17, 22-25.) To the extent Wheeler's assertion is, as it appears, part and parcel of his Napue claim, he has failed to establish error for the reasons set forth above. To the extent Wheeler is attempting to raise a separate misconduct claim based solely upon the prosecutor's closing argument, such a claim also fails.

Wheeler did not object to the portion of the prosecutor's rebuttal closing of which he complains. (See Trial Tr., Vol. II, p.401, L.25 – p.402, L.8.) As such, his claim of error will not be considered absent a showing that the error was fundamental. State v. Severson, --- P.3d ----, 2009 WL 1492659 *17 (Idaho 2009). "Misconduct will be regarded as fundamental error when it 'goes to the foundation or basis of a defendant's rights or . . . to the foundation of the case or

take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." Id. (quoting State v. Bingham, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989)). Even then, "the conviction will not be reversed if the error is harmless." Severson, 2009 WL 1492659 *17 (citing State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007)). In the context of closing arguments, the Idaho Supreme Court has stated:

> Prosecutorial misconduct rises to the level of fundamental error if it is calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. More specifically, prosecutorial misconduct during closing arguments will constitute fundamental error only if the comments were so egregious or inflammatory that any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded.

State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003) (citations, quotations, and brackets omitted). Where the argument complained of is made in rebuttal closing, the United States Supreme Court has recognized "[t]he prosecutors' comments must be evaluated in light of the defense argument that preceded it." Darden v. Wainwright, 477 U.S. 168, 179 (1986).

Although it is undoubtedly error for a prosecutor to vouch for the credibility of a witness, it is not error for a prosecutor to ask the jury to draw inferences regarding credibility from the evidence. State v. Porter, 130 Idaho 772, 786, 948 P.2d 127, 141 (1997); State v. Gross, 146 Idaho 15, ___, 189 P.3d 477, 481 (Ct. App. 2008); State v. Timmons, 145 Idaho 279, 288-89, 178 P.3d 644, 653-54 (Ct. App. 2007). Wheeler argues the following portion of the prosecutor's rebuttal closing argument was improper:

> There's nothing wrong with Officer Jayne's investigation because there's some minor inconsistency between something that was said in three different places. Did you hear anything that struck you as being, the officer is lying? I mean, everything that the officer said has been corroborated by evidence that's been offered to you by the defense. So think about that. Is he going to risk his career to make this case?

(Appellant's Brief, p.22 (quoting Tr., Vol. II, p.401, L.25 – p.402, L.8).)

Wheeler does not explain why he believes this argument constitutes improper vouching other than to assert, "the prosecutor argued that the minor discrepancies in the officer's testimony should be ignored."[4] (Appellant's Brief, p.22.) It is clear from the face of the rebuttal argument excerpted above that the prosecutor did not ask the jury to "ignore" anything. The prosecutor merely asserted Trooper Jayne's investigation was not deficient merely because Wheeler thought there were some inconsistencies in what Trooper Jayne said. Such argument was a proper, measured response to Wheeler's claims in closing argument suggesting the state's witnesses were "liars," including Trooper Jayne. (Trial Tr., Vol. II, p.383, L.2 – p.390, L.11.) Contrary to Wheeler's assertions, this is not improper vouching, it is merely asking the jury to reach a contrary conclusion on the officer's motivations and actions than that advocated by the defense.

[4] Indeed, Wheeler fails to cite, much less discuss, any Idaho case on the issue of vouching. (See generally Appellant's Brief, pp.22-24.) He instead cites a Ninth Circuit case which states "improper vouching may occur in at least two ways" - "[t]he prosecutor may either 'place the prestige of the government behind the witness or . . . indicate that information not presented to the jury supports the witness's testimony.'" (Appellant's Brief, p.24, quoting United States v. Edwards, 154 F.3d 915, 921 (9th Cir. 1998)). However, Wheeler does not assert the prosecutor in this case vouched for Trooper Jayne in either of these two ways.

The prosecutor in this case did exactly what prosecutors are allowed to do. He asked the jury to draw reasonable inferences from the evidence regarding whether the officer fabricated evidence, as claimed by Wheeler. It is not "vouching" to address and rebut such defense claims, especially such serious allegations as having fabricated evidence, a felony in Idaho. See I.C. § 18-2603 (fabricating or altering evidence in felony case is felony punishable by up to five years in prison). Wheeler has thus failed to show error.

Even if it was error for the prosecutor to suggest that Trooper Jayne would not "risk his career to make this case," see, e.g., Gross, *supra*, the error was not fundamental. The prosecutor's solitary comment implying that Trooper Jayne would not "risk his career" by lying about minor details was not the type of argument that is calculated to "inflame the minds of jurors and arouse passion or prejudice against" Wheeler, nor was it "so inflammatory that the jurors may [have] be[en] influenced to determine guilt on factors outside the evidence." Sheahan, 139 Idaho at 280, 77 P.3d at 969. Thus, even assuming Wheeler has raised a prosecutorial misconduct claim separate and distinct from his Napue claim, and even assuming the prosecutor's comment implying Trooper Jayne would not "risk his career to make this case," the error was not fundamental, and Wheeler has failed to establish any deprivation of due process.

II.

Wheeler Has Failed To Establish Error In The Denial Of His Suppression Motion

A. Introduction

Wheeler complains the district court erred in denying his suppression motion because, he argues, (1) "the forcible blood draw was unreasonable under the circumstances of this case," and (2) he "revoked his implied consent."[5] (Appellant's Brief, p.26.) Both of Wheeler's claims fail. The district court correctly concluded the blood draw was permissible under State v. Diaz, 144 Idaho 300, 160 P.3d 739 (2007).

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006); State v. Barker, 136 Idaho 278, 280, 40 P.3d 86, 88 (2002); State v. Spencer, 139 Idaho 736, 738, 85

[5] Wheeler also argues the district court erred in denying his motion to suppress because, he asserts, the prosecutor failed to correct Trooper Jayne's false testimony, which he claims the district court "reli[ed']" on when "making its decision to allow the results of the forcible blood test to be admitted." (Appellant's Brief, p.26.) Specifically, Wheeler argues the district court relied on Trooper Jayne's "lie[]" that he told Wheeler if he did not consent to a breath test, he was going to perform a blood draw. (Appellant's Brief, p.35.) Because whether Trooper Jayne lied about giving Wheeler the option is irrelevant to the issues presented at the suppression hearing, Wheeler's argument that the "district court erred in finding the actions of the police officer reasonable in light of the fact that he lied" (Appellant's Brief, p.35) lacks merit.

P.3d 1135, 1137 (Ct. App. 2004); State v. Devore, 134 Idaho 344, 346-47, 2 P.3d 153, 155-56 (Ct. App. 2000).

C. The District Court Correctly Applied The Law To The Facts In Denying Wheeler's Motion To Suppress

The district court, relying on the Idaho Supreme Court's opinion in State v. Diaz, 144 Idaho 300, 160 P.3d 739 (2007), denied Wheeler's suppression motion, concluding (1) Wheeler could not revoke his consent under I.C. § 18-8002, and (2) there was no unreasonable use of force in withdrawing his blood. (Supp. Hrg. Tr., pp.27-33.) Wheeler claims both of these conclusions were erroneous. Wheeler is incorrect.

In Diaz, the Idaho Supreme Court held, pursuant to Idaho's implied consent statute, law enforcement may require an individual suspected of driving under the influence to submit to "evidentiary testing for alcohol," which may "include testing the suspect's blood . . .." 144 Idaho at 302, 160 P.3d at 741 (citing I.C. § 18-8002(1), (9)). The Court in Diaz further stated "a blood draw must comport with Fourth Amendment standards of reasonableness." Id. at 303, 160 P.3d at 742. As in all Fourth Amendment contexts, "reasonableness standards are assessed objectively by examining the totality of the circumstances." Id. (citations omitted). Applying this standard to the circumstances in Diaz's case, the Court concluded the blood draw was reasonable, stating:

> Here, Diaz was first offered a breathalyzer test, which he initially refused, then agreed to, and ultimately refused. After Diaz had declined this somewhat less intrusive alternative, [Officer] Montgomery transported him to a nearby hospital where a qualified

> hospital technician drew his blood. Diaz was not manhandled while being transported to the hospital or during the procedure itself. Under the totality of the circumstances the police acted reasonably, using only handcuffs to transport Diaz to the hospital and having the blood test administered by a qualified hospital technician.

Diaz, 144 Idaho at 303, 160 P.3d at 742.

Implicit in the Court's opinion that the implied consent statute permits evidentiary testing to determine blood alcohol content is the conclusion that such consent cannot be withdrawn. Not only is this conclusion implicit in Diaz, it is expressly articulated in State v. Cooper, 136 Idaho 697, 39 P.3d 637 (Ct. App. 2002), citing State v. Woolery, 116 Idaho 368, 775 P.2d 1210 (1989). In Cooper, the Court of Appeals stated:

> Cooper argues that he revoked his previously implied consent when he refused to submit to a blood test and that the consequence of his refusal is suspension of his driver's license pursuant to I.C. § 18-8002A. This issue was previously raised and rejected in *Woolery*, where our Supreme Court held that the Idaho Legislature has acknowledged a driver's physical ability to refuse to submit to an evidentiary test, but did not create a statutory right for a driver to withdraw his previously given consent to an evidentiary testing for alcohol, drugs or other intoxicating substances.

136 Idaho at 700, 39 P.3d at 640.

In discussing the issue of implied consent, Wheeler does not cite Diaz or Cooper. (See Appellant's Brief, pp.32-34.) Rather, Wheeler, citing Woolery and State v. Turner, 94 Idaho 548, 494 P.2d 146 (1972), acknowledges the "Idaho Supreme Court has previously held that, 'there is no constitutional right to refuse' an evidentiary test for alcohol concentration," but suggests that holding is of no import because it "was not based on any federal court authority" and because "no federal court has every squarely addressed whether a suspect retains the right to

revoke his implied consent to evidentiary testing for alcohol concentration, under the Fourth Amendment." (Appellant's Brief, p.33.) Wheeler's argument is both factually wrong and irrelevant.

The Idaho Supreme Court's opinions in both Woolery and Turner relied on the United States Supreme Court's opinion in Schmerber v. California, 384 U.S. 757 (1966), in which the Supreme Court concluded that a forced blood draw taken from an individual suspected of driving under the influence did not violate his constitutional rights. 384 U.S. at 758-59. While the Supreme Court's opinion was predicated upon the exigency exception to the warrant requirement rather than an implied consent statute, for Fourth Amendment purposes that distinction is irrelevant.

Also irrelevant is whether the Court's conclusions in Woolery and Turner were "based on any federal court authority." Such reliance is not a prerequisite to whether Idaho precedent is binding in Idaho or whether a party is required to cite such precedent. Idaho's appellate courts have clearly concluded that implied consent cannot be revoked. The rule of stare decisis dictates that controlling precedent be followed "unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." State v. Dana, 137 Idaho 6, 9, 43 P.3d 765, 768 (2002); State v. Humphreys, 134 Idaho 657, 660, 8 P.3d 652, 655 (2000) (quoting Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)); see also State v. Guzman, 122 Idaho 981, 1001, 842 P.2d 660, 680 (1992) ("[P]rior decisions of this Court should govern unless

they are manifestly wrong or have proven over time to be unjust or unwise."); State v. Odiaga, 125 Idaho 384, 388, 871 P.2d 801, 805 (1994) ("Having previously decided this question, and being presented with no new basis upon which to consider the issue, [the court must be] guided by the principle of stare decisis to adhere to the law as expressed in [its] earlier opinions.").

Wheeler has also failed to establish the district court erroneously concluded the blood draw was not unreasonable. In reaching this conclusion, the district court found:

> [A]s in the Diaz case there is evidence before the court that the person that drew the blood appears to be a medical technician qualified to do that. I agree with the state that the issue here is not whether in fact that personnel from Clark Fork ambulance is in fact an R.N. or is a phlebotomist or is otherwise qualified to draw blood does not bear on the reasonableness of the police conduct. It could bear on the admissibility of the results of that blood sample, but it does not bear on the reasonableness of the police conduct.
>
> It was reasonable in the court's view for the trooper to rely on the ambulance member's assertion that he was qualified to draw blood. That seems like a reasonable course of conduct is to rely on that assertion.
>
> And then the fact that this blood draw was done at the scene of the arrest rather than at a hospital is a little bit different from the Diaz case. And in fact in this case Mr. Wheeler was not even placed in the ambulance, he was in the back seat of a patrol car. But there is no evidence before the court that it is a medially unacceptable manner of withdrawing blood. This court in its common sense and life experience presumes that there are other times in life where emergency medical responders draw blood in scenes other than a hospital or other than a [sic] ambulance that probably draw blood or administer injections, administer medical procedures while persons are sitting not even in police patrol cars, but in other privately owned vehicles as well. So there's no evidence before the court that this is a medically unacceptable manner of withdrawing the blood.

> Now, the evidence before the court also is that one officer held Mr. Wheeler's left arm and that Trooper Jayne held, by the wrist of Mr. Wheeler, Mr. Wheeler's right arm and held that right arm out in a more or less straight manner, maybe not at a 90 degree angle from the ground, but at least held the arm out so that the elbow was extended such that the person drawing the blood could actually do that procedure and draw the blood. But there's no evidence before this court that that is an unreasonable use of force.
>
> It would be dangerous to Mr. Wheeler given the fact that he had been physically uncooperative to a small degree, but to a degree, physically uncooperative with the police, they had to restrain him from sitting down when they're trying to conduct field sobriety examinations, it would be dangerous to Mr. Wheeler to allow him to even begin moving his arm or thrashing, it would be injurious [sic] to him to allow that. It would injurious [sic] to the possible procedure of taking the blood to allow that.
>
> So for one officer to hold the left wrist of Mr. Wheeler and another officer to extend the right arm by holding the right wrist of Mr. Wheeler, this court is going to find is not an unreasonable use of force but is in fact a reasonable use. I would not even call it a force, a reasonable use of physical touching of the suspect or a physical control of a suspect.

(Supp. Hrg. Tr., p.31, L.21 – p.33, L.24.)

On appeal, Wheeler, relying on his own embellished version of events, contends "Trooper Jayne's conduct was unreasonable." (Appellant's Brief, pp.31-32.) In support of his claim, Wheeler notes (1) his belief that Trooper Jayne's request for a breath test was "superficial," (2) Trooper Jayne "obtained hobbles out of the trunk of his car in anticipation of Mr. Wheeler physically refusing the blood draw," (3) Wheeler told them not to draw his blood, said it hurt, and said he was "leaking blood all over the place," and (4) he "informed Trooper Jayne that he was hurting his leg restraining him during the blood draw." (Appellant's Brief, pp.31-32.) None of these arguments establish unreasonable force was used in drawing Wheeler's blood.

First, Wheeler's belief that Trooper Jayne's request for a breath test was "superficial" is irrelevant. "The evidentiary test to be employed is of the officer's choosing." Diaz, 144 Idaho at 302, 160 P.3d at 741 (citing Halen v. State, 136 Idaho 829, 833, 41 P.3d 257, 302 (2002)). Trooper Jayne was, therefore, not obligated to provide Wheeler the opportunity, superficial or otherwise, to submit to a breath test before conducting a blood draw. And, there is no constitutional basis for "[s]uppressing the blood test results in this case" to "encourage officers to use forcible blood draws when necessary and not simply as a matter of course." (Appellant's Brief, p.30.)

Second, the fact that Trooper Jayne retrieved hobbles from his trunk in case Wheeler became uncooperative is also irrelevant. There is no such thing as an anticipatory Fourth Amendment violation. Trooper Jayne never hobbled Wheeler in order to obtain his blood. Neither the presence of unused hobbles nor Trooper Jayne's opinion that Wheeler might be combative renders the blood draw unreasonable.

Third, as previously noted, because Wheeler impliedly consented to evidentiary testing, including a blood draw, the fact that he did not want his blood drawn is immaterial.

Fourth, that Wheeler stated it hurt when he was actually poked with the needle does not mean the force used was unreasonable. If that were true, all blood draws would be unreasonable.

Fifth, Wheeler's drunken statement on the video that he was "leaking blood all over" not only does not make it so, it does not mean the force was unreasonable.

Sixth, Wheeler did not complain about Trooper Jayne "restraining" his leg until after the blood draw. (Ex. 1, compare 19:03:20 (Trooper Jayne asks EMT for band-aid) and 19:03:30 (Trooper Jayne tells Wheeler they are done "poking him") with 19:04:08 (Wheeler complains Trooper Jayne is "breaking his leg").) How Wheeler's complaint *after* the blood draw that Trooper Jayne was hurting his leg demonstrates there was unreasonable force used in obtaining his blood is unclear.

In short, a review of the video of the blood draw supports the district court's conclusion that the blood draw was reasonable. (See generally Ex. 1, 18:53:50-19:03:30.) Wheeler has failed to establish otherwise.

CONCLUSION

The state respectfully requests that this Court affirm Wheeler's conviction and sentence in Docket No. 35684 and the sentence imposed in Docket No. 35677.

DATED this 9th day of July 2009.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of July 2009, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

DIANE WALKER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General